penalised, and it would seem that on that basis no order was made thereon. The summons appears to have been taken out and arguments advanced on the postulate of non-compliance with the terms of the consent order and no mention of trickery or fraud appears to have been made then nor was the Armorduct principle mooted or considered. There was no disclosure then which became apparent only when the respondent gave evidence under oath at the hearing of the garnishee summons some eight months later that the moneys deposited in court were not his and that he did not know who had in fact made this payment. Again no one seemed at that stage to have been aware that the debtor had filed a petition for bankruptcy on November 29, 1977 nor had all the evidence been taken to determine or consideration given to the question as to whether there were any moneys due from the respondent to the debtor which were attachable. And in any event we do not think when the time came for the learned judge to consider the application or applicability of the provisions of section 50 of the Bankruptcy Act that he was precluded from considering the question of trickery or fraud in the light of the evidence adduced or rather to be adduced at the hearing of the garnishee summons and the relevance or otherwise of the Armorduct principle in the context of these proceedings.

In view of the divers matters we have adumbrated we think that all the evidence should have been taken and completed and the several aspects of this matter considered before the learned judge could come to a firm conclusion on the issue to be decided on the garnishee summons, quite apart from the undesirability of leaving unchallenged on record, in fairness if for nothing else, the gross allegations of criminal and professional misconduct made against two members of the Bar appearing in the case and for that matter the father of the appellant's managing director. The facts and circumstances of this matter manifest a position where section 50 of the Bankruptcy Act would appear to be a *terminus a quo* rather than *ad quem*. We are accordingly of the view that the submission made by counsel for the respondent to the learned judge on section 50 of the Bankruptcy Act at the stage that he did in the midst of evidence being taken and before it was completed was presumptuous and premature in the context of this case and the decision of the learned judge in acceding thereto was therefore regrettably precipitate. In the event we think this is a proper case to order a retrial of the garnishee summons.

We accordingly allow the appeal with costs, set aside the order of the learned judge made on December 6, 1978 and order that the garnishee summons in this case be tried *de novo* before another judge. The learned judge made no order as to the costs before him but we think that the proper order should now be that the costs below be costs in the cause. The deposit in court by way of security will be paid out to the appellant and the moneys lodged in court under the order of April 25, 1977 will remain there until the final disposal of this matter. One thing more: the parties might perhaps now wish to explore the necessity or desirability of a trial with pleadings in the circumstances of this case and seek directions from the trial judge to this end as this is a matter best sorted out in the court below.

Appeal allowed.

Solicitors: *Mariadass Lock & Co.; Mahendran & Co.*

MINISTER OF LABOUR AND MANPOWER & ANOR. v. PATERSON CANDY (MALAYSIA) SDN. BHD.

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat & Syed Othman F.JJ.) March 4 & April 2, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 4 of 1978]

Administrative Law — Certiorari — Application to quash decision of Minister — Claim for recognition of trade union — Decision of Minister — Made after inquiry by Registrar of Trade Unions — Whether Minister exercised discretion properly — Ouster clause — Minister not exceeding jurisdiction — Certiorari does not lie — Trade Union Act, 1959, ss. 2(2) & 17(1) — Industrial Relations Act, 1967, s. 9.

Industrial Law — Trade Unions — Claim for recognition — Failure to accord recognition — Order by Minister — Trade Union Ordinance, 1959, ss. 2 & 17 — Industrial Relations Act, 1967, s. 9.

This was an appeal from the decision of Harun J., reported in [1979] 2 M.L.J., 294. The facts were that in 1973 the National Union of Commercial Workers (NUCW) claimed recognition from the respondents, which wrote to the Director-General of Industrial Relations (DGIR) for advice whether to grant recognition or not. The DGIR informed NUCW that it could not claim recognition. Then in 1976 another trade union the Machinery Manufacturing Employees Union (MMEU) claimed recognition. The respondent company referred the matter to DGIR and it received a reply that the MMEU was entitled to represent its workers. The respondent company refused to accept this advice and although the DGIR through the Registrar of Trade Unions refused to reconsider the matter and although a membership check by the Registrar of Trade Union revealed that 62.5% of the workers belonged to the union, the respondent company refused to grant recognition to the MMEU. In 1976 the MMEU reported the matter to the Minister. In the meantime the workmen in despair of being represented by a trade union joined the NUCW which again claimed recognition. The respondent company again sought the advice of the DGIR who returned the same answer. The respondent company decided to accord recognition to the NUCW. Subsequently the DGIR informed the respondent company that the Minister had decided that the company should accord recognition to the MMEU. The respondent company thereupon applied for an order of *certiorari* to quash the decision of the Minister. An order of *certiorari* was made in the High Court and the appellant thereupon appealed to the Federal Court.

Held, allowing the appeal: (1) the Minister in this case had the right to make the order he made and did not exceed his jurisdiction in doing so;

(2) the Minister was entitled to ask the Registrar of Trade Union to make the relevant inquiry;

(3) it was clear that the requirement of similar trades etc., in section 2(2) of the Trade Union Ordinance 1959 favoured the MMEU and not the NUCW and the Minister had not exceeded his jurisdiction or committed a jurisdictional error;

(4) in view of the ouster clause in section 9(5) of the Industrial Relations Act, 1967, *certiorari* could not lie in this case, as there was no excess of jurisdiction.

Cases referred to:-

(1) *Attorney-General of Malaysia* v. *Chemical Workers' Union of Malaya & Anor.* [1971] 1 M.L.J. 38, 40.

(2) *Regina* v. *Secretary of State for Social Services, Ex parte Lewisham, Lambeth and Southwark London B.C.*, The London *Times*, February 26, 1980.

(3) *Attorney-General, Bahamas* v. *Ryan* [1980] 2 W.L.R. 143.

(4) *Paterson Candy (M) Sdn. Bhd.* v. *Minister for Labour & Manpower & Ors.* [1979] 2 M.L.J. 294.

FEDERAL COURT.

Fong Seng Yee (Senior Federal Counsel) for the appellants.

C.V. Dass for the respondents.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): This appeal is concerned with the recognition of a trade union in general and in particular with the interpretation of "similar trades, occupations or industries" occurring in section 2(a) of the Trade Union Ordinance No. 23 of 1959 (the Ordinance).

The relevant provisions for the recognition of trade unions are in section 9 of the Industrial Relations Act, 1967, Act 177 (the Act) which in its relevant parts reads:

"9. (2) A trade union of workmen may serve on an employer or on a trade union of employers in writing a claim for recognition in respect of the workmen or any class of workmen employed by such employer or by the members of such trade union of employers.

(3) An employer or a trade union of employers upon whom a claim for recognition has been served shall, within twenty-one days after the service of the claim, either accord recognition or, if recognition is not accorded, notify the trade union of workmen concerned in writing the grounds therefor.

(4) Upon receipt of a notification under subsection (3) or where an employer or a trade union of employers has failed to comply with subsection (3), the trade union of workmen may report the matter in writing to the Minister.

(5) The Minister, upon receipt of a report under subsection (4), may take such steps or make such inquiries as may be necessary or expedient to resolve the matter or to give a decision thereon; where the Minister decides that recognition is to be accorded, such recognition shall be deemed to be accorded by the employer or trade union of employers concerned, as the case may be; a decision of the Minister under this subsection may include a decision as to who are workmen employed in a managerial, executive, confidential or security capacity; a decision of the Minister under this section shall be final and shall not be questioned in any court.

(6) Where any step taken or any inquiry made in respect of a report to the Minister under subsection (4) is taken or made by or under the direction of the Director General it shall be deemed to be a step taken or an inquiry made by the Minister under subsection (5)."

By these provisions, the notification to the Minister arises when the employer fails to award recognition within 21 days after the service of the claim for recognition or fails to give its grounds in writing. The notification is ordinarily made by the trade union. On receipt of the notification, the Minister may after taking such steps or making such enquiries as may be necessary or expedient make his decision ordering the employer to grant recognition and his order which is to take effect as from the date of the service of his decision on the employer or the trade union is final and shall not be questioned in any court. The step or enquiry by the Minister may be taken or made by the Director-General or under his direction on his behalf.

Section 2(a) of the Ordinance gives the following definition of a trade union, omitting words not relevant to this appeal:

"'trade union' or 'union' means any association or combination of workmen or employees, being workmen or employees ....

(a) within any particular trade, occupation or industry or within any similar trades, occupations or industries; and ...."

By this definition, no trade union can grow out of itself. It must be an association, put shortly, of workmen in similar trades, occupations or industries.

To turn now to the facts of this case. On November 7, 1973, a trade union known as the National Union of Commercial Workers (NUCW) claimed recognition from the appellants. The respondent company did not act under section 9(3) of the Act either to recognise or to refuse with its grounds for doing so but instead wrote to the Director-General of Industrial Relations (DGIR) for advice whether to grant recognition or not. By letter dated November 28, 1973, the DGIR informed NUCW that it could not claim recognition, a decision which the DGIR refused to reconsider after a protest had been lodged by the respondent company.

For 27 months thereafter nothing was done to give the workmen in the respondent's employ the protection of and the privileges of belonging to a trade union. Then on March 2, 1976, another trade union, the Machinery Manufacturing Employees Union (MMEU) claimed recognition. Again the respondent company did not decide for itself. It took a similar action in writing to the DGIR but this time it received a reply, that the MMEU was entitled to represent its workers. Whereas previously it had acted faithfully on the advice of the DGIR, an advice which was clearly palatable to someone seeking to deprive its workmen of the protection of a trade union, it now hedged. It now appeared to have acquired an ability to decide that the MMEU did not consist of members of similar trades, etc. and with this newly acquired perception, it advised the DGIR accordingly. The DGIR through the Registrar of Trade Unions refused to reconsider. But despite the firm decision of the DGIR and despite the finding that some 62.5% of the workmen now belonged to this trade union, the respondent company refused at all times to grant recognition to the MMEU. The DGIR then made his report to the Minister under section 9(5).

Before the Minister could make known his decision, a new complication took form. The workmen apparently in despair of being represented by a trade union joined the NUCW which now bounced back into the picture and claimed recognition. For the third time, the respondent company sought the advice of the DGIR. Predictably the DGIR returned the same answer, and the company, faced with the options, now decided to accord recognition to the NUCW. By such recognition, it pre-empted the decision of the DGIR made known ten days later that (1) the NUCW was not permitted to represent the employees and (2) under section 9(5) recognition was to be granted to MMEU. That was on March 22, 1977.

Pursuant to leave granted on September 13, 1977, the respondent company moved the High Court for

an order of *certiorari* to remove the decision of the Minister into that court for the purpose of quashing it. Its grounds were that the Minister was wrong in law and had acted in excess of his jurisdiction (1) in deciding that MMEU should represent the employees (2) when (and ignoring the fact that) at the time of his decision the NUCW was already representing the employees. It was also said that the Minister was in error of law when he was "influenced by or held himself bound by" the advice of the Registrar of Trade Unions as to the appropriateness of MMEU and when he failed to give the company a reconsideration of the decision of April 10, 1976 after a lapse of more than the 30 days specified in section 17 of the Ordinance.

Section 17 of the Ordinance, in its relevant parts, reads:

"17(1). Any person dissatisfied with any opinion of the Registrar given under subsection (2) of section 2 . . . may within 30 days appeal to the Minister against the opinion, refusal or order."

Subsection (2) of section 2 in so far as it is relevant provides that:

"2(2). For the purposes of the definition of 'trade union' in subsection (1). . . 'similar' means in the opinion of the Registrar."

Subsection (1) of section 2 contains the definition of a trade union as an association of workmen of similar trades, etc.

Two questions were considered by the High Court in connection with this section 17. In the first, the High Court held that it was for the MMEU and not for the respondent to appeal. With respect, we cannot agree. On a proper interpretation to be given to the section and on the facts, the respondent company was the person dissatisfied with the Minister's decision to afford recognition to the MMEU and not to the NUCW and therefore it was for the respondent company to appeal and not for the MMEU.

The second concerned the functions of a Registrar of Trade Unions and the extent of these functions. It is clearly his function under the Ordinance to determine similarity of trades, etc. With respect, we agree with the High Court, that this function of the Registrar is for the purposes of the Trade Union Ordinance, in other words for the purpose of the registration of a trade union. To that extent, we agree that *Attorney-General of Malaysia* v. *Chemical Workers Union of Malaya & Anor.*[1] at page 40 was rightly decided, but that case must be read in the full realisation that the statutory process for the recognition of a trade union has been drastically changed. Whereas by the law under which it was decided, jurisdiction was conferred on the Industrial Court, and the Minister played no part except to refer the matter to that court, the amended law under which this case was to be decided has now taken away the jurisdiction of the Industrial Court and conferred it on the Minister with the provision that his decision shall be final and not questionable in any court and the further provision that he may cause any step to be taken or any enquiry to be made by or under the direction of the DGIR. On this statutory provision, an enquiry may now properly be made by or under the direction of the DGIR for the purposes of a claim for recognition under section 9 of the Act. There is no reason which we can see, either under the law or as a matter of common sense why the DGIR cannot direct the Registrar of Trade Unions to make the relevant enquiry. With respect, we hold that the High Court is in error in holding as it did that the Registrar's opinion is irrelevant in a dispute concerning recognition under section 9(5) of the Act. We do not think that the *Chemical Workers' Union* case decided this point, since the law was different. What it did in our opinion decide was that when the competent authority to decide a claim for recognition was the Industrial Court and no provision existed for an enquiry to be made by the Minister through the DGIR or under his direction, the Registrar's decision could not override the duties and functions of the court to come to its own decision.

For ourselves we consider that the proper and most convenient approach to the problem before the High Court subject to one important qualification, which will be dealt with later, was for the judge, in the absence of any question of the Minister's *bona fides*, following that taken by Woolf J. in *Regina* v. *Secretary of State for Social Services, Ex parte Lewisham, Lambeth and Southwark London B.C.*[2] to ask himself the following questions:

1. Whether there was material on which the Minister could reasonably come to the conclusion that he should exercise his powers under section 9(5) of the Act in the way he did.
2. Assuming that it was such a case, whether he exercised his discretion properly and that involved considering whether he took into account some irrelevant matter or failed to take into account some relevant matter or otherwise misdirected himself in law.
3. Whether the direction was one he was entitled to make as a matter of law.

The qualification arises from the ouster clause in section 9(5) of the Act. The effect of an custer clause has been recently considered in the Privy Council in *Attorney-General, Bahamas* v. *Ryan.*[3] *Per* Lord Diplock at page 152, reading "final" for "not subject to appeal":

"'Appeal' in the context of an ouster clause means re-examination by a superior judicial authority of both findings of fact and conclusions of law as to the legal consequences of those facts made by an inferior tribunal in the exercise of a jurisdiction conferred upon it by statute to decide questions affecting the legal rights of others, and the substitution of the superior judicial authority's own findings of fact and conclusions of law for those of the inferior tribunal. In 'review' the function of the superior judicial authority is limited to re-examining the inferior tribunal's conclusions of law as to the legal consequences of the facts as they have been found by the inferior tribunal. It is by now well-established law that to come within the prohibition of appeal or review by an ouster clause of this type, the decision must be one which the decision-making authority, under this Act the Minister, had jurisdiction to make. If in purporting to make it he has gone outside his jurisdiction, it is *ultra vires* and is not a 'decision' under the Act. The Supreme Court, in the exercise of its supervisory jurisdiction over inferior tribunals, which include executive authorities exercising quasi-judicial powers, may, in appropriate proceedings, either set it aside or declare it to be a nullity: *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 A.C. 147.

It has long been settled law that a decision affecting the legal rights of an individual which is arrived at by a procedure which offends against the principles of natural justice is outside the jurisdiction of the decision-making authority. As Lord Selborne said as long ago as 1885 in *Spackman* v. *Plumstead District Board of Works* (1885) 10 App. Cas. 229, 240: 'There would be no decision within the meaning of the statute if there were anything ... done contrary to the essence of justice.' See also *Ridge* v. *Baldwin* [1964] A.C. 40.

Their Lordships, in agreement with all the judges in the courts below, would therefore conclude that the ouster clause in section 16 of the Bahamas Nationality Act 1973 does not prevent the court from inquiring into the validity of the Minister's decision on the ground that it was made without jurisdiction and is *ultra vires*."

The court's power to investigate the question whether the Minister's decision was made with or without jurisdiction must mean that *certiorari* does not lie by way of an undisguised appeal on an error of fact.

We do not imagine for a moment that it was ever contended that the Minister has no right to make the direction that he did make. The only issue is therefore whether he exceeded his jurisdiction or in other words he committed a jurisdictional error in making that direction.

The similarity of trades etc. must basically be determined by the membership rules of the two unions. These rules have been incorporated in the record and were obviously before the Registrar of Trade Unions and the Director-General of Industrial Relations and the High Court had a look at them: see the judgment of the High Court *sub nom. Paterson Candy (M) Sdn. Bhd.* v. *Minister for Labour & Manpower & Ors.*[4] at page 295 for a full reproduction of these rules. The NUCW is in respect, to extract briefly from these rules, of workers in wholesale and resale trading of goods and the provision of commercial services associated therewith. The rules of the MMEU, on the other hand, make it clear that its members are restricted to workers engaged in the manufacture and repair of machinery. Even though it was claimed that the work of the respondent company had now been reduced to consultative status, it is clear that the requirement of similar trades etc. in section 2(2) of the Ordinance favours the MMEU and not the NUCW, and the Minister had not exceeded his jurisdiction or committed a jurisdictional error. The Minister who is not bound to accept the report of the DGIR or the Registrar of Trade Unions has therefore made an order against which no *certiorari* can possibly lie. The decision of the respondent company to recognise NUCW before the decision of the Minister reached it was a deliberate pre-emption in defiance of what it must reasonably expect to be coming from the Minister and in our view it would be manifestly unjust to found *certiorari* on it.

It follows that the appeal must be allowed and the order of the High Court quashed. The respondent shall pay the costs of the proceedings in the High Court and in this court.

Appeal allowed.

Solicitors: *Shook Lin & Bok.*

TEO KIM KIEN & ORS. v. LAI SEN & ANOR.

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat & Syed Othman F.JJ.) March 10 & April 2, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 198 of 1978]

Tort — Negligence — Employee of service station driving motor car belonging to customer — Whether operators of service station liable for negligence of employee — Damages paid by insurers of owner of motor car — Subrogation — Action against operators of service station — Third party action against employee driver.

Insurance — Motor Insurance — Damages paid by insurers of owner of motor vehicle — Subrogation.

In this case the first respondent sent his motor car for a wash and instructed that the car be returned to a certain address and if he was not there to return it the service station. After the car wash, the second respondent, an employee of the service station, drove the car to the address and not finding the first respondent then returned to the service station. On the way back he knocked down an on-coming motor cyclist in circumstances which left no doubt that he was negligent. The motor cyclist sustained injuries and sued the first respondent for damages. The claim was settled by the first respondent's insurers. The insurers also paid for the damages to the first respondent's car and other expenses. Subsequently at the request of the insurers the first respondent brought an action against the appellants, the operators of the service station, to recover the sums paid by the insurers. The defence of the appellant was that (1) the second respondent was at the relevant time the agent of the first respondent and (2) that the first respondent had suffered no loss as the claims had been met by the insurers and therefore the claim was "totally misconceived, frivolous and an abuse of the process of law". The defence also joined the second respondent by way of third party proceedings. The learned Special President Sessions Court gave judgment to the first respondent and dismissed the third party action against the second respondent. She held that it was a case of bailment and that though the second respondent drove the first respondent's car at his request, he was at that time the servant or employee of the appellants, who were thus liable for his negligence. The appeal to the High Court was dismissed and the appellant appealed to the Federal Court.

Held: (1) the finding that the second respondent was the servant or agent of the appellants at the accident was not merely based on abundance of evidence but was also a concurrent finding of fact in the Sessions Court and in the High Court which is beyond the powers of the Federal Court to reverse;

(2) under the doctrine of subrogation the claim of the first respondent against the appellants though brought by the insurers was maintainable;

(3) the appellants were entitled to obtain judgment in the third party action against the second respondent in view of his admitted negligence.

Cases referred to:-

(1) *Mersey Docks & Harbour Board* v. *Coggins & Griffith* [1947] A.C. 1.

(2) *Hobbs* v. *Marlowe* [1978] A.C. 16, 37.

(3) *Morley* v. *Moore* [1936] 2 K.B. 359.

(4) *Yorkshire Insurance Co. Ltd.* v. *Nisbet Shipping Co. Ltd.* [1962] 2 Q.B. 330.

FEDERAL COURT.

Ng Yook Woon (*Andrew Saw* with him) for the appellants.

K. Anantham for the 1st respondent.

P.S. Gill for the 2nd respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): The facts in this case, save in one particular, are largely undisputed.